DEPARTMENT OF THE ARMY
HEADQUARTERS, UNITED STATES ARMY FORCES COMMAND
FORT MCPHERSON, GEORGIA 30330-6000

REPLY TO
ATTENTION OF

AFLG-PROM (715) 13 December 1996

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Contracting Information Letter (CIL) 97-14, GAO Protests Filed in the Second and Third Quarters of FY 96

1. The following statistics and information apply to GAO protests filed in the second and third quarters of FY 96:

	2Q96	3Q96
Total protests filed in DA	63	87
Protests filed in FORSCOM	6	7

2. The following sustained protests are of interest.

USACOE

a. **CNA Industrial Engineering, Inc.**, 3-271034, 7 Jun 96, 96-1 CPD. The Huntsville District issued RFP DACA87-95-R-0092, for an Automated Storage and Retrieval System (ASRS), Brooke Army Medical Center (BAMC), Fort Sam Houston, San Antonio, Texas. The highly complex automated system allowed for the efficient receipt, storage, distribution, and reordering of medical supplies, pharmaceuticals, and linens, at BAMC. The RFP specified that the ASRS must interface with the Army's informational software system, known as TAMMIS, and that a successful offeror must have experience with the TAMMIS system. Huntsville accepted the offer of GeneSys, Inc. (GI). Although GI had no TAMMIS experience, they had experience on the Air Force's MEDLOG system which Huntsville found equivalent to TAMMIS. Applying a clause found in the solicitation that purported to permit the contracting officer discretion to accept a proposal meeting the government's true needs that might not otherwise conform with all RFP requirements, Huntsville accepted GI's nonconforming experience. On 5 Feb 96, CNA Industrial Engineering, Inc., (CNA) filed a protest with GAO. In its protest, CNA argued that Huntsville improperly accepted GI's proposal by relaxing the requirement that the successful offeror demonstrate TAMMIS experience. On 7 Jun 96, the GAO issued a decision sustaining CNA's protest.

Lesson Learned: The District realized after submission of proposals that the agency's needs could be satisfied by an alternative method other than that listed in the specifications. In an effort to loosen the specification to accommodate GI's lack of TAMMIS experience and accept its alternative MEDLOG experience without issuing an amendment, the District used an open ended clause that allegedly permitted acceptance of the alternative proposal. Use of this clause conflicted with correct procurement procedures and was therefore impermissible notwithstanding its presence in the solicitation. Clauses in a solicitation that purport to waive the requirements of the RFP at the discretion of the contracting officer will not be used.

b. **Holiday Inn - Laurel**, B-270860.3 and B-270860.4, 30 May 96, Fort Meade, Maryland. Holiday Inn protested the evaluation of its proposal under RFP DAHC36-95-R-0012 for the provision of meals, lodging, and transportation to support the Baltimore Military Entrance and Processing Station in Baltimore, Maryland. Holiday Inn alleged that the Army had improperly evaluated its proposal under the site visit factor, improperly required it to submit past performance evaluations when the Army possessed such evaluations, and improperly evaluated its orientation plan. Holiday Inn also protested the Army's refusal to award it the contract after the Small Business Administration (SBA) issued the firm a Certificate of Competency (COC). The Army took corrective action by reopening discussions and including the protester's proposal in the competitive range. The Army conducted discussions, evaluated the revised proposals received, and determined that Holiday Inn's proposal would not be considered for award because its technical proposal was rated marginal and its past performance was poor. Holiday Inn protested again to GAO, alleging that the Army had improperly evaluated its technical proposal with respect to past performance. They challenged the Army's past performance evaluation to the extent that it constituted a nonresponsibility determination. The Army referred the matter to the SBA for review under its COC procedures. GAO reviewed the documents and determined that the evaluation was flawed, finding that the Army did not weight the technical evaluation factors equally. Moreover GAO found that the evaluators had improperly downgraded the protester's proposal based on its past performance under numerous evaluation factors and subfactors that did not provide for the evaluation of past performance. The Army again took

corrective action, and reevaluated the proposals consistent with GAO concerns. As a result, Holiday Inn was determined to be the lowest-priced, technically acceptable offeror, and thus in line for award. However, the Army did not make award to Holiday Inn because it had been determined nonresponsible, and SBA's decision on the COC was still pending. On 6 Mar 96, the SBA declined to issue the protester a COC, then subsequently issued a COC after conducting its own facility and financial survey. After the Army refused to recognize the COC and award to Holiday Inn, the GAO held that the Army must consider the SBA's issuance of the COC as conclusive, terminate the award to CMS and award the contract to Holiday Inn.

3. Due to length, see M.R. Dillard Construction (encl 1) and S.D.M. Supply (encl 2) for two interesting sustained protests.

4. The case at encl 3 (John Martino, B-262168, 24 May 1996) should get the attention of KOs everywhere. It pertains to the assessment to a KO of $88,040 as reimbursement for the unnecessary expenditure of commission funds due to his failure to conduct a proper market survey. The case involves employee-incurred debt under the Claims Collection Act. The Claims Collection Act and 31 U.S.C. sec., 3702(a) provided GAO with jurisdiction over claims submitted by employees against whom their agency assessed liability.

Although enclosure 3 is not a protest per se, it provides some insight in resolving employee-incurred debt under the Claims Collection Act.

5. For additional information, please contact Irene Hamm, DSN 367-5632 or email hammi@ftmcphsn-emhl.army.mil.

3 Encls
as

BEVERLY Y. THOMAS
Acting Chief, Contracting Division, DCSLR
Acting Principal Assistant Responsible
for Contracting

NUMBER: B-271518.2
DATE: 28 Jun 96
TITLE: M.R. Dillard Construction

Sustained protest

DIGEST

An unsigned bid is responsive where the individual that signed the Certificate of Procurement Integrity was authorized to bind the bidder at the time of bid submission.

DECISION

M.R. Dillard Construction protested cancellation of the contract award DACA27-96-C-0040 to Dillard by the US Army Corps of Engineers, Louisville District, under invitation for bids (IFB) No. DACA27-96-B-0014, for the installation of additional railroad track at Fort Campbell, Kentucky.[1]

Dillard submitted the low bid by the 22 Feb 96, bid opening date. Dillard's bid omitted the back of Standard Form (SF) 1442, Solicitation, Offer, and Award, included with the IFB, on which the bidder was to execute its offer and the government using to make award. The back of the SF 1442 contains an offer section including, among other items, spaces for the bidder to enter the name and title of the person authorized to sign the offer, a space for that person's signature, and spaces to acknowledge amendments. The offer section also provides a space for a bidder to enter the dollar amount of its bid, although in this case bidders were instructed to instead enter their prices on a bid schedule included on a separate continuation sheet. The back of the SF 1442 contained other material provisions such as the minimum bid acceptance period and the bidder's agreement to furnish performance and payment bonds. Dillard's bid did contain the front side of the SF 1442.

Dillard's bid indicated that the bidding entity was owned by M.R. Dillard. The bid included a Certificate of Procurement Integrity (CPI) in the representations and certifications section. The CPI was executed by Harry Q. Horner, Dillard's general superintendent with his original signature. M.R. Dillard's rubber stamp facsimile signature was used on documents throughout the rest of the bid, including an additional procurement integrity certification on the continuation sheet of the bid schedule as well as on the amendments and the required bid bond.

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After bid opening, Dillard submitted the completed back of the SF 1442, which it explained had been signed by Mr. Dillard on the day of bid opening but was inadvertently omitted during the preparation of the bid package. Dillard also explained that Mr. Horner had the authority to contractually bind Dillard as well as to use the owner's rubber stamp facsimile signature. As a result, the Corps waived as a minor informality Dillard's failure to include in its bid the back of the SF 1442 with its owner's signature, and awarded the contract to Dillard on 7 Mar.

Following a protest filed with GAO on 22 Mar, Firth Construction Co., Inc., the second low bidder, the Corps determined that Dillard's bid should have been rejected as nonresponsive because it did not contain an original signature that could bind Dillard to the terms of the IFB. The Corps found nothing submitted by Dillard prior to bid opening that authorized the use of the owner's rubber stamp facsimile signature or that authorized Dillard's superintendent to bind Dillard contractually. The Corps declared that it improperly awarded the contract to Dillard and then took corrective action by canceling the award. GAO dismissed Firth's protest as academic on 23 Apr. Dillard protested on 26 Apr. The Corps withheld award to Firth pending a decision.

As a general rule, an unsigned bid must be rejected as nonresponsive because without an appropriate signature, the bidder would not be bound should the government accept the bid. Stafford Grading and Paving Co., Inc., B-245907, 14 Jan 92, 92-1 CPD para. 66. Federal Acquisition Regulation (FAR) sec. 14.405(c) permits waiver of a bidder's failure to sign its bid only if--

(1) The unsigned bid is accompanied by other material indicating the bidder's intention to be bound by the unsigned bid (such as the submission of a bid guarantee or a letter signed by the bidder, with the bid, referring to and clearly identifying the bid itself); or

(2) The firm submitting a bid formally adopted or authorized, before the date for opening of bids, the execution of documents by typewritten, printed, or stamped signature and submits evidence of such authorization and the bid carries such a signature

Dillard conceded that by omitting the back page of the SF 1442, its bid, as submitted, was unsigned by its owner and not accompanied by documentation that showed that the owner's rubber stamp facsimile signature used elsewhere in the bid was authorized. Nonetheless, Dillard contends that its omission of

the back of the SF 1442 was properly waived by the Corps as a minor informality and that Dillard should retain the award because other evidence in its bid, specifically the original signature of Dillard's superintendent on the CPI, shows that Dillard intended to be bound by its bid. The GAO agreed.

A signed CPI included in a bid package is sufficient to show a bidder's intention to be bound by its bid, even if the bid is unsigned. Johnny F. Smith Truck and Dragline Serv., Inc., B-252136, 3 Jun 93, 93-1 CPD para. 427; JRW Enters., Inc., B-238236, 11 May 90, 90-1 CPD para. 464. The GAO views a *bidder's signature included in a bid package as the prime* consideration for determining a bidder's intent to be bound; the fact that the signature appears in other than the usual location does not mean the bidder is any less committed to the provisions of the solicitation. The GAO further noted that the individual executing the CPI must have the authority to bind the bidder to its bid as well as the certificate because of the significant legal obligations contained in the certificate, and the penalties imposed upon the certifying individual for violating the certificate, as well as the administrative penalties that might be imposed on the contractor for its employee's violation.[2] See Sweepster Jenkins Equip. Co., Inc., B-250480, Feb. 8, 1993, 93-1 CPD para. 111, rev'd on other grounds, Schmidt Eng'g & Equip., Inc.; Defense Logistics Agency--Recon, 72 Comp. Gen. 262 (1993), 93-1 CPD para. 470.

The Corps contended that the bid indicated that Dillard's owner, not Dillard's general superintendent, was the person authorized to sign Dillard's bid and bind the bidder. However, the record shows that Dillard's superintendent was indeed authorized to sign Dillard's bid on behalf of the owner at the time of bid opening. The Certification of Independent Price Determination included in the bid stated that Mr. Horner was an authorized agent of Dillard. In addition, Dillard, in response to Firth's earlier protest, supplied the Corps with copies of letters, signed by the owner during 1986, authorizing Mr. Horner to legally bind Dillard contractually by Mr. Horner's own signature and to use the owner's rubber stamp facsimile signature. The protester also submitted an affidavit from the owner iterating Mr. Horner's authority to bind Dillard and authenticating the 1986 letters, which the owner stated continued in full force and effect. The GAO held that the evidence required to show the authority of an individual signing a bid may be presented after bid opening. 49 Comp. Gen. 527 (1970); Schmidt Eng'g & Equip., Inc.; Defense Logistics Agency--Recon,

supra; Hutchinson Contracting, B-251974, 18 May 18 93, 93-1 CPD para. 391. Accordingly, the original signature of Dillard's superintendent on the completed CPI in Dillard's bid sufficiently demonstrates Dillard's intent to be bound by its bid and permits its acceptance.[3]

The Corps nevertheless argued that Dillard's bid was nonresponsive because documentation showing authority to use the owner's rubber stamp facsimile signature was not provided by Dillard prior to bid opening as required, see Stafford Grading and Paving Co., Inc., supra, and the stamp, rather than any original signature by an authorized official, was used in connection with material provisions of the IFB, such as the additional procurement integrity certification included on the continuation sheet, the amendments, and the bid bond. However, as discussed further below, since Dillard was bound to its bid by virtue of Mr. Horner's execution of the CPI, Dillard's failure to include original signatures on other portions of the IFB was not material.

Specifically, the procurement integrity certification on the continuation sheet to the bid schedule, which was acknowledged by the rubber stamp signature of Mr. Dillard, imposed no legal requirements beyond those stated in the full text of the CPI in the IFB's representations and certifications section.[4] By entering his original signature on the CPI in the representations and certifications section, Mr. Horner certified that he was the officer or employee responsible for the preparation of the bid and that to the best of his knowledge, each officer, employee, agent, representative, and consultant of Dillard who had participated personally and substantially in the preparation or submission of the bid had certified his or her familiarity and compliance with the requirements of the relevant OFPP Act provisions. Therefore, the fact that the additional certification on the continuation sheet was acknowledged by the Mr. Dillard's rubber stamp facsimile signature does not render the bid nonresponsive. Further, although Mr. Dillard's name was entered on the continuation sheet beneath his rubber stamp signature as the officer or employee responsible for the offer, the GAO determined the identify of the actual certifier was clearly established by the full text of the CPI, which was personally executed by Mr. Horner and properly identified Mr. Horner as the "certifier." See Aerospace Design, Inc., B-259350, 23 Mar 95, 95-1 CPD para. 161.

Further, notwithstanding that the owner's facsimile signature stamped on the first pages of the amendments which Dillard included in its bid, the superintendent's authorized original signature elsewhere in the bid ensures that acceptance of the bid

will, as a legal matter, obligate Dillard to perform in accordance with the terms of the solicitation, including the amendments, at the bid price. See First Fed. Data Servs., B-216487, 21 Dec 84, 84-2 CPD para. 685. Likewise, regarding Dillard's use of the owner's rubber stamp signature on its bid bond, the GAO regarded the signature on the bid bond as a material requirement with which the bidder must comply in order to be responsive where, as here, the bond is submitted with a bid which contains a signature sufficient to bind the bidder. See Noslot Pest Control, Inc., 68 Comp. Gen. 396 (1989), 89-1 CPD para. 396; The Ryan Co., B-245659, Oct. 23, 1991, 91-2 CPD para. 365.

The fact that Dillard's bid did not include the back page of the SF 1442 did not render it nonresponsive, inasmuch as Dillard bound itself to the provisions (e.g., the minimum bid acceptance period and the requirements to furnish performance and payment bonds) contained thereon by acknowledging receipt of an amended version of the SF 1442, containing the same material provisions as the omitted SF 1442. See Weber Constr., B-233848, 27 Mar 89, 89-1 CPD para. 309.

As Dillard's bid was responsive and should have properly been accepted by the Corps for award, the GAO recommended that the Corps reinstate the award of the contract to Dillard. In addition, they recommended that Dillard be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees.

NOTES:

1. This decision is made under our express option procedures, 4 C.F.R. sec.21.10 (1996).

2. Since the contract was expected to exceed $100,000, the IFB contained the CPI clause set forth at FAR sec. 52.203-8. The clause serves to implement the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. sec. 423(e) (1994), which precludes federal agencies from making award to a competing contractor unless the officer or employee of the contractor responsible for submitting the offer or bid certifies in writing that neither he nor those employees who participated in preparing the bid have any information concerning violations or possible violations of the OFPP Act. C.B.C. Enters., Inc., 72 Comp. Gen. 275 (1993), 93-1 CPD para. 495. The activities prohibited by the OFPP Act involve soliciting or discussing post-government employment, offering or accepting a gratuity, and soliciting or disclosing proprietary or source selection information.

3. Contrary to the Corps's assertion, Dillard's status as a sole proprietorship does not preclude it from being bound by an authorized individual acting on behalf of the owner. See Jordan Contracting Co.; Griffin Constr. Co., Inc., B-186836, 16 Sep 76, 76-2 CPD para. 250.

4. The continuation sheet warned bidders that failure to complete the additional certification would render the bid nonresponsive. However, that certification is not the additional procurement integrity certification contemplated under FAR sec. 3.104-9(d) that may be requested by the agency, such as the certifications from others who participated in preparing or submitting the bid which the signer of the certificate is required to collect. See Sweepster Jenkins Equip. Co., Inc., supra.

NUMBER: B-271492
DATE: 26 Jun 96
TITLE: S.D.M. Supply, Inc.

Sustained protest

DIGEST

Agency failed to promote competition to the maximum extent practicable under a request for quotations issued on the Federal Acquisition Computer Network (FACNET) using simplified acquisition procedures where the agency failed to maintain adequate procedures for receiving quotations through FACNET, as evidenced by its loss of all of the quotations submitted through FACNET because of a previously identified systemic problem with its computer.

DECISION

S.D.M. Supply, Inc., protests the issuance of purchase order No. DABT01-96-V-0248 to New Pig Corp under request for quotations (RFQ) No. DABT01-96-T-0112 issued by the US Army Aviation Center, Fort Rucker, Alabama, as a small business, small purchase set-aside, for seven aerosol can puncturing systems.[1] S.D.M. contended that the agency failed to consider S.D.M.'s lower priced quotation that was timely submitted through the FACNET.

FACNET refers to a government-wide electronic commerce/ electronic data interchange systems architecture that provides for electronic data interchange of acquisition information between the government and the private sector, employs nationally and internationally recognized data formats, and provides universal user access. Federal Acquisition Streamlining Act of 1994, 41 U.S.C sec. 426(a), (b)(3) (1994); Federal Acquisition Regulation (FAR) sec., 4.501 (90-29). FACNET creates an electronic marketplace for the acquisition of supplies and services. Through FACNET, contracting agencies post (1) notices of and receive responses to solicitations, (2) post notices of contract awards, and issue orders where practicable; and (3) private sector users access notices of solicitations, receive orders, and access contract award information. 41 U.S.C. sec. 426(b)(1), (2).

A contracting agency enters solicitation data into FACNET through a business application program on its computer. The data is electronically transmitted to a government gateway, that is a computer/communications system that performs a variety of data management functions, such as converting business application program data into the proper data format for subsequent transmission. After processing by the gateway, the information

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is transmitted to a network entry point, which is also government operated, and relayed to Value-Added Networks (VAN).[2]. VANs are private sector entities that provide information obtained from the FACNET to their customers who registered to do business with the government and known as trading partners. Trading partners submit quotations through FACNET to the contracting agency in reverse order to that described above. All transactions conducted over FACNET, except the issuance of RFQs, are acknowledged automatically by the end of the business day following the arrival of the transmission at its destination to notify the sender as to whether a transaction was received, e.g., to notify a trading partner that its quotation was received by the contracting agency.

Facts in the case are that the RFQ was issued through FACNET on 7 Feb 96. The RFQ was also mailed to New Pig and one other vendor. The RFQ instructed vendors that quotations were due by close of business 20 Feb, and that quotations could also be submitted to the contracting office via facsimile transmission. Only one quotation, from New Pig, was received at the contracting office by the time and date set for receipt of quotations. Additionally, this quotation was submitted via facsimile transmission to the contracting office. Because no quotations were received through FACNET, the purchasing agent asked the office's computer systems administrator to verify that no quotations were received on the office's computer. Following the computer administrator's confirmation, the purchasing agent determined that New Pig's quotation of $4,473 was fair and reasonable, and issued the purchase order to New Pig on 21 Feb.

The contracting office posted a notice on FACNET that the purchase order was issued to New Pig. As a result of this notice, the contracting office received telephone calls from three other vendors, including the protester, stating that they submitted quotations through FACNET for this RFQ and that their quoted prices were lower than New Pig's. When the agency declined to cancel the purchase order, S.D.M. filed an agency-level protest, contending it should have been issued the purchase order based on its lower quotation of $3,080. This protest was accompanied by printed records from S.D.M.'s computer showing transactions with its VAN, including the quotation it claimed to have submitted on 8 Feb to Fort Rucker, as well as an acknowledgment of the receipt of its quotation dated 9 Feb.

The contracting officer denied S.D.M.'s protest because the protester had not shown that the agency's failure to receive S.D.M.'s quotation was caused by government computer error or malfunction or by government mishandling. To this, the contracting officer asserted that the acknowledgment received by

S.D.M. was generated by S.D.M.'s VAN and not by the government, and not evidence of receipt of S.D.M.'s quote by the government. S.D.M. then filed its protest with the GAO, contending that the acknowledgment it received was in fact generated by the government, and because the government actually received S.D.M.'s quotation, the agency's failure to consider the quotation was the result of mishandling.[3]

The Army admits that on the date that quotations were due, the FACNET system malfunctioned. During a telephonic hearing conducted by the GAO, agency personnel stated that, after S.D.M.'s protest was filed, they discovered computer records showing that three vendors, including S.D.M., had in fact submitted quotations through FACNET for this RFQ, which were received by the Standard Army Automated Contracting System (SAACONS) government computer gateway located at Fort Lee, Virginia, and relayed to Fort Rucker. Correcting the agency's earlier assertion, the agency personnel stated that the acknowledgment received by S.D.M. was in fact generated by the government upon receipt of its quotation rather than by the protester's VAN. During this telephonic hearing, the SAACONS software technician explained that S.D.M.'s quotation was "lost" because of a transmission "bottleneck" located at the Fort Rucker computer system, which had to be cleared before the quotations could continue to the contracting office destination, and that this problem was not discovered until after the contracting office issued the purchase order.

Since the acknowledgment received by S.D.M. was generated by the SAACONS government gateway, which then transmitted S.D.M.'s quotation to Fort Rucker, the protester received the acknowledgment, even though the "bottleneck" at the Fort Rucker computer prevented S.D.M.'s and the other vendors' quotations from actually being received by the contracting office. The contracting personnel, who were inexperienced with the computer system, failed to check available computer system status reports, that would have indicated the existence of the problem, and were thus unaware of the problem preventing the receipt of FACNET quotations prior to the issuance of the purchase order. Finally, during the telephonic hearing the contracting personnel reported several other instances of quotations transmitted over FACNET being "lost" in the computer system at Fort Rucker, including other situations where, as here, the contracting office failed to receive any of the quotations submitted through FACNET in response to an RFQ.

Agencies, using simplified acquisition procedures, must promote competition "to the maximum extent practicable." Competition in Contracting Act of 1984 (CICA), 10 U.S.C. sec. 2304(g)(3)(1994). In meeting this requirement, agencies must make reasonable efforts, consistent with efficiency and economy, to afford all eligible and interested vendors an opportunity to compete. RMS Indus., B-247074, 18 Mar 92, 92-1 CPD para. 290. Agencies have a fundamental obligation to have procedures in place not only to receive quotations, but also to reasonably safeguard quotations actually received and to give them fair consideration. East West Research Inc., B-239565; B-239566, 21 Aug 90, 90-2 CPD para. 147, Defense Logistics Agency--Recon., B-239565.2; B-239566.2, 19 Mar 91, 91-1 CPD para. 298. Conversely, it is recognized that as a practical matter, even with appropriate procedures in place, an agency occasionally will lose or misplace a bid or quotation, especially when the procuring activity is responsible for a high volume of small purchase buys, and has taken the position that the occasional negligent loss of a quotation by an agency does not entitle the supplier to any relief. Id.; Interstate Diesel Serv., Inc., B-229622, Mar. 9, 1988, 88-1 CPD para. 244.

This case involves more than mere occasional negligent loss of a quotation. Instead, the agency's loss of the protester's quotation was due to a systemic failure that resulted in the loss of all other quotations submitted for this RFQ through FACNET. The agency reports that similar systemic failures have occurred for other RFQs issued by Fort Rucker. As indicated, an agency, in order to satisfy its obligation under CICA to promote competition to the maximum extent practicable, must have adequate procedures to receive and safeguard quotes actually received, as well as to give them fair consideration. East West Research Inc., supra. The record evidences that the agency did not have adequate procedures in place to ensure that quotations received through FACNET would be considered, and therefore we sustain the protest on this basis.[4]

The agency states that in light of the problems it has experienced with FACNET, it allows quotations to be submitted via facsimile transmission in order to give vendors as much opportunity as possible to participate, and asserts that the protester should have availed himself of this opportunity. However, the GAO determined that the protester was under no obligation to transmit its quotation via facsimile to the agency because the RFQ did not caution potential quoters of the problems encountered in receiving quotes over FACNET and the protester reasonably relied on the acknowledgment that its quotation were received by the government through FACNET. The FAR contemplates that responses to solicitations and requests for information

issued through FACNET will be submitted through FACNET in furtherance of the goal of converting the acquisition process from paper-based to an electronic one. FAR sec. 4.505-1(b)

Since the agency took delivery of the aerosol can puncturing systems, no corrective action is feasible. The GAO recommended that the protester recover its quotation preparation costs, as well as the costs of filing and pursuing its protest.

NOTES:

1. These devices are used to render discarded aerosol cans safe for incineration.

2. A VAN, typically a commercial information service, provides access to FACNET as well as communications services, electronic mailboxes and other services for electronic data interchange transmissions. See FAR sec. 4.501.

3. S.D.M. also complains that the aerosol can disposal system was available on a General Services Administration Federal Supply Schedule contract at a lower price than New Pig's. The agency contracting personnel state that they were unaware until after award that the disposal system was listed on the schedule.

4. The SAACONS software technician reports that a procedure is being implemented for the future, which will allow the Ft. Rucker contracting personnel to automatically print status reports to alert them to such computer system problems.

Matter of John Martino

B-262168

Date: 24 May 24 1996

DIGEST

The Claims Collection Act and 31 U.S.C. sec. 3702(a) provide GAO with jurisdiction over claims submitted by employees against whom liability has been assessed by their agencies. Our review is limited to a review of the agency's legal basis for assessing liability (i.e., the existence of statutory authority or appropriate regulations), whether the agency has followed the applicable statute and regulations, and whether the agency had a rational basis for assessing liability. Where the Panama Canal Commission found that the employee, a contracting officer, failed to comply with the Federal Acquisition Regulation requirement to conduct a market price study prior to extending a contract, a rational basis exists for assessing liability against him. Employee was provided notice and a hearing pursuant to 31 U.S.C. sec. 3716 and agency regulations. The Panama Canal Commission acted properly in using administrative offset procedures to set off his debt against his final salary payments and accumulated leave and is entitled to proceed through the Office of Personnel Management to collect the balance remaining against his Civil Service Retirement Fund account.

DECISION

This decision is in response to a letter from the attorney for John Martino concerning his indebtedness to the Panama Canal Commission (PCC). Mr. Martino is contesting the validity of an $88,040 assessment of indebtedness on his part to the PCC.

BACKGROUND

The case stems from the 1991 extension authorized by Mr. Martino of the PCC's contract PC-1p-1903 for liquid chlorine. In January of 1994, the PCC Inspector General reported irregularities in the procurement and the PCC subsequently found that Mr. Martino was obligated to pay the agency the sum of $88,040 as reimbursement for the unnecessary expenditure of commission funds for which he was alleged to be responsible.

Mr. Martino retired from the PCC effective January 4, 1994. In March 1994, PCC sent Mr. Martino notice of his indebtedness. The PCC partially offset the debt against his final salary payments and accumulated leave and informed Mr. Martino that the offset was in accordance with the Federal Claims Collections Standards,

Encl 3

4 C.F.R. Part 102 (31 U.S.C. sec. 3716 (1994)). PCC is seeking the balance of the debt through administrative offset against monies due to Mr. Martino from the Civil Service Retirement and Disability Fund.

Mr. Martino claims that the offset against his salary was required to be conducted pursuant to 5 U.S.C. sec. 5514 (1994) and its implementing regulations found in 35 C.F.R. Part 256 that provide him the opportunity to question the validity of the debt by submitting a claim to our Office.

In response, the PCC asserts that GAO does not have jurisdiction over this matter. In a letter to our Office, the PCC reiterates its assertion that the offsets were commenced after Mr. Martino's retirement and that its action is therefore an administrative offset against a former employee under 4 C.F.R. Part 102, not a salary offset against a current employee subject to further proceedings under 35 C.F.R. Part 256.

ANALYSIS AND CONCLUSION

Under 31 U.S.C. sec. 3702(a) (1994) the Comptroller General has the authority to settle all claims of or against the United States Government, except those claims that are under the exclusive jurisdiction of administrative agencies pursuant to specific statutory authority. Our Office has recognized that the PCC has limited authority granted under the Panama Canal Act of 1979 to settle the claims arising against the government and the PCC relating to property damage and loss and personal injury or death arising from the operation of the waterway. Panama Canal Commission Liability and Settlement Authority on Claims, B-197052, Apr. 22, 1980. Our Office, however, has jurisdiction under 31 U.S.C. sec. 3702(a) of other claims by or against the PCC in the absence of any statutory authority granting jurisdiction to the PCC over such claims.

Our jurisdiction over Mr. Martino's claim does not depend on whether the collection is taken as a "salary offset" under 5 U.S.C. sec. 5514 or as an "administrative offset" under 31 U.S.C. sec. 3716. However, in light of Veterans Administration, 64 Comp. Gen. 907 (1985), we agree with PCC that the offset against Mr. Martino's final salary appropriately was made under the Federal Claims Collection Act, 31 U.S.C. sec. 3716, i.e., "administrative offset."

Turning to the merits of the dispute, we have limited our review of claims by agencies against employees to a review of the agency's legal basis for assessing liability (i.e., the existence of statutory authority or appropriate regulations) and whether

the agency has followed the applicable statute and regulations. We will not second-guess the agency's determination that a given set of facts constitutes negligence unless the agency's finding can be said to lack a rational basis. Walter C. Stephenson, 65 Comp. Gen. 177, 179-80 (1986).

The PCC assessed liability against Mr. Martino, the contracting officer, for failing to comply with the Federal Acquisition Regulation (FAR) requirement to conduct a market price study prior to extending a contract. FAR sec. 17.207. PCC also relied on its acquisition regulations, set out in 48 C.F.R. Part 35, which state that personal liability may be assessed against the individual who has made an unauthorized commitment of government funds. Panama Canal Commission Acquisition Rules (PAR) sec. 3501.602-3(b)(1).

The basis for assessing the debt against Mr. Martino was the lack of evidence that he conducted or relied upon any kind of market survey in signing the contract extension as required by regulation. PCC's inspector General found substantial evidence to support the conclusion that the extension was made with the knowledge that it was not supported by fact and was contrary to law or regulation. In particular, the contract extension was for $355/ton of liquid chlorine at a time when the producer price index was around $200/ton at the point of origin and the contractor was paying $165/ton to its supplier. The PCC concluded that since prices were considerably lower than the PCC was paying, Mr. Martino could not have conducted the required investigation of market prices prior to extending the contract. The PCC found that Mr. Martino's deliberate disregard of the FAR that required a market analysis made him responsible for the losses sustained by PCC as a result of his actions. Given the wide disparity in prices between what the PCC paid and what it might have paid for the commodity in question, we conclude that the PCC had a rational basis for the finding it reached.

In collecting the debt through administrative offset under 31 U.S.C. sec. 3716, the PCC proceeded in accordance with 4 C.F.R. Part 102. The procedural rights to which Mr. Martino was entitled included written notice of the nature and amount of the debt, notice of the agency's intention to collect the debt by offset, an opportunity to inspect and copy agency records pertaining to the debt, the opportunity to obtain review within the agency of the determination of indebtedness, and the opportunity to enter into a written agreement with the agency to repay the debt.

Our analysis of the record indicates that the PCC followed the applicable statute and regulations in administering the offset. Mr. Martino was provided notice of his indebtedness on March 2, 1994, PCC's intention to administratively offset the debt was provided in a June 14, 1994, letter to Mr. Martino; Mr. Martino was furnished documents on June 20, 1994; and a hearing was held with Mr. Martino present on October 18, 1994.

Given the limited scope of our review in this case, there is no relief our Office can grant Mr. Martino. As noted above, we conclude that the PCC had a rational basis for assessing liability against him. Moreover, it followed the applicable statute and regulations. Accordingly, the collection action taken through administrative offset was proper and the PCC may proceed through the Office of Personnel Management to collect on its claim against Mr. Martino's Civil Service Retirement and Disability Fund account.